No. _____

In The

Supreme Court of the United States

October Term, 1997

CITY OF MONTEREY,

Petitioner,

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND MONTEREY-DEL MONTE DUNES CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a regulatory taking action challenging a local land use decision, 42 U.S.C. § 1983 requires that all liability issues be determined by the court rather than by a jury.

2. Whether liability for a regulatory taking can be based upon a standard that allows a jury or court to reweigh evidence concerning the reasonableness of the public agency's land use decision.

3. Whether the reasonable proportionality standard established by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) in the context of property exactions can properly be applied to an inverse condemnation claim based upon a regulatory denial.

PARTIES BELOW

The parties below consisted of plaintiffs Del Monte Dunes at Monterey, Ltd. and Monterey-Del Monte Dunes Corporation and defendant City of Monterey.

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PETITION FOR A WRIT OF CERTIORARI

The City of Monterey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 95 F.3d 1422 (9th Cir. 1996). Pet. App. A1-A29. The relevant, prior orders of the district court are unreported but are included herein at Pet. App. A30-A43.

JURISDICTION

The court of appeals filed its initial opinion on September 13, 1996 (95 F.3d 1422). The court of appeals initially granted rehearing on June 26, 1997 (Pet. App. A44) and subsequently decided on October 28, 1997 not to amend its opinion. (Pet. App. A46) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution, Section 1, which provides, in pertinent part:

   No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Fifth Amendment to the United States Constitution, which provides, in pertinent part:

   No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Seventh Amendment to the United States Constitution, which provides:

   In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact trial by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

4. 42 U.S.C. § 1983, which provides, in pertinent part:

   Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

This case involves a 37-acre parcel of undeveloped property located in the coastal area of the City of Monterey in California. The topography of the property consists largely of beach area and sand dunes. Since the early

1970s, the property has been zoned for residential development.

By virtue of its location and topography, any development of this property would raise important environmental considerations. Among other things, the sand dunes and the vegetation on the property provide habitat for the endangered Smith's Blue Butterfly ("SBB"). For this reason, both the United States Department of Fish and Wildlife ("USFWS") and the California Department of Fish and Game ("DFG") expressed keen interest in the property and how any proposed development might impact the sensitive SBB habitat.

After significant planning efforts involving the City, the owner of the property and others over a substantial period, the City gave conditional approval in September 1994 to a proposed site plan for a 190-unit condominium development. Among other things, however, the City advised the property owner that final approval of this proposed project would be contingent upon the owner's ability to provide adequate mitigation of adverse environmental impacts of the proposed development, including impacts on the SBB habitat. In this regard, the City required that the owner prepare a proposed habitat restoration plan and seek approval of that plan from USFWS and DFG.

Shortly after the City gave this conditional approval, Respondents purchased the subject property in December 1994 for approximately $3.7 million. Thereafter, after eighteen months of additional consultations involving the City, Respondents, the California Coastal Commission, USFWS, DFG, other experts, and the public, Respondents

sought final approval of the proposed 190-unit development. As part of the public hearing process, Respondents presented a report from its consultant which concluded that the restoration plan generated as part of the proposed development had adequately mitigated any impact on the sensitive habitat located thereon. USFWS and DFG expressed contrary views as did members of the public and other experts. USFWS concluded that Respondents' proposed restoration plan had "little chance for long term success." The DFG advised the City that it had problems with the proposed restoration plan and that the proposed plan had not been approved by DFG. In June 1996, the City Council denied the proposed development because, among other things, it concluded that the proposed development and restoration plan did not adequately address the City's concerns over habitat protection.

Immediately thereafter, Respondents filed suit alleging that the City's denial of the proposed 190-unit project constituted a denial of their rights to substantive due process and equal protection and resulted in a taking of the subject property. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. An initial dismissal of the action on ripeness grounds was reversed by the Ninth Circuit, and the matter was remanded to the district court. *Del Monte Dunes at Monterey Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990). In December 1991, Respondents sold the property to the State of California for $4.5 million. However, Respondents continued to pursue their constitutional challenges, and the matter proceeded to trial in early 1994.

Prior to the commencement of trial, the City moved for an order that the liability issues raised by each of

Respondents' claims be decided by the court rather than a jury. The district court granted this motion insofar as it was directed at the substantive due process claim and concluded that it was its responsibility to decide whether the City's actions were arbitrary and capricious. Pet. App. A33. However, the district court ruled that all aspects of Respondents' equal protection and inverse condemnation claims would be decided by a jury. Pet. App. A33-A34.

The evidence at trial consisted largely of the same conflicting evidence that the City Council had considered in mid-1986 when it denied the proposed development. Respondents presented the same habitat expert that they had presented to the City Council, and he expressed the same opinion that the habitat restoration plan that had been proposed by Respondents was adequate. The City introduced contrary opinions from a different expert who had also previously expressed his opinions to the City Council. The City also introduced as evidence the same USFWS and DFG evaluations of likely environmental impacts and the inadequacy of the proposed restoration plan that had been considered by the City Council.

After hearing all of the evidence, the district court concluded that the City had not acted arbitrarily and capriciously so as to violate Respondents' right to substantive due process. The Court concluded that, in rejecting the proposed development, the City "was acting for valid regulatory reasons and not attempting to forestall all reasonable development." Pet. App. A43. In arriving at this conclusion, the district court noted that the proposed project raised environmental issues that both USFWS and DFG had concluded were not adequately mitigated. Pet. App. A42.

In contrast, with respect to the claims for denial of equal protection and for inverse condemnation, the jury concluded on the same evidence that the City's denial of the proposed 190-unit condominium development had resulted in an uncompensated taking of Respondents' property and had violated Respondents' equal protection rights. The jury awarded $1.45 million in temporary takings damages.

On appeal, the City challenged the jury's decision as to both the equal protection and inverse condemnation claims. The Court of Appeals for the Ninth Circuit affirmed the judgment on the basis of the jury's inverse condemnation verdict and therefore did not deem it necessary to address the City's challenges to the equal protection verdict.

With respect to the inverse condemnation claim, the panel ruled that all issues relating to the inverse condemnation claim were properly submitted to the jury for decision. Pet. App. A7-A15. The court reasoned that such inverse condemnation claims were analogous to common law damage actions such as actions for trespass or replevin which had historically been triable by jury at common law. Pet. App. A9. The Ninth Circuit further concluded that the issues of inverse condemnation liability were essentially factual questions for the jury rather than mixed questions of fact and law of a type that were properly decided by the court. Pet. App. A15.

As to the standard that should be applied to determine whether the jury's inverse condemnation verdict could be upheld, the Ninth Circuit applied a reasonableness test. The court explained that the jury's decision was

sustainable so long as there was evidence in the trial record that would support a finding by the jury that the City had acted unreasonably in concluding that the proposed project failed to provide adequate protection for sensitive environmental habitat or otherwise failed to satisfy the conditions imposed by the City's conditional approval. Pet. App. A14, A16-A20.

In arriving at this reasonableness standard, the Ninth Circuit did not simply determine whether the jury could have properly found that the City's action in denying the proposed 190-unit project failed to substantially advance the legitimate public goal of protecting the environment. Instead, the court applied the standard of rough proportionality based upon this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) which was decided several months after the trial in the present action. In framing the issue, the Ninth Circuit reasoned that "[e]ven if the City had a legitimate intent in denying Del Monte's development application, its action must be 'roughly proportional' to furthering that interest." Pet. App. A16. The Ninth Circuit concluded that "[s]ignificant evidence supports Del Monte's claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development." Pet. App. A20.

REASONS FOR GRANTING THE PETITION

In holding that a party has a right to have a jury determine liability in an inverse condemnation claim, the Ninth Circuit's decision conflicts directly with decisions of the Eleventh Circuit and departs sharply from the

accepted procedure for litigating such claims in both federal and state courts.

Further, the lower court's conclusion that a jury can invalidate a local land use decision and award almost $1.5 million in damages because it concludes, based upon its *de novo* review of conflicting evidence, that the decision was unreasonable, constitutes an entirely new, intrusive standard of constitutional review that is inconsistent with long-standing federal precedent and federalism concerns.

Finally, the Ninth Circuit's application of the rough proportionality standard to measure the validity of the City's concerns that prompted denial of the proposed 190-unit development represents an unwarranted extension of this Court's "rough proportionality" standard, which was developed in the context of property exactions, and is inconsistent with a long string of precedent in which this Court has held that regulatory takings are to be evaluated based upon whether the challenged action substantially advances a legitimate public purpose.

I. THE NINTH CIRCUIT'S DECISION HAS CREATED A CONFLICT AMONG THE CIRCUITS CONCERNING THE RIGHT TO JURY TRIAL AS TO INVERSE CONDEMNATION CLAIMS AND REPRESENTS A SHARP DEPARTURE FROM THE ACCEPTED MANNER OF LITIGATING SUCH CLAIMS.

For as long as regulatory takings claims have been litigated in federal courts, the issue of inverse condemnation liability has almost uniformly been decided by courts

rather than by juries. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. 1205, 1215 (D. Kan. 1992); *Warner/Elektra/Atlantic Corp. v. County of Dupage*, 771 F. Supp. 911, 913 (N.D. Ill. 1991), *aff'd on other grounds*, 991 F.2d 1280 (7th Cir. 1993). In case after case, this Court has decided claims of inverse condemnation liability as matters of law or mixed law and fact. *See, e.g., Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Indeed, it was so accepted that such issues were appropriate for court resolution that, until recently, the federal courts have rarely been called upon to expressly address this issue.

The Ninth Circuit's decision that a jury should decide inverse condemnation liability issues is a sharp departure from this accepted and usual approach and represents a clear conflict with the views of the Eleventh Circuit – the only other circuit that has squarely addressed this issue. In *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2514 (1997), the Eleventh Circuit held that there is no right to jury trial to determine liability in inverse condemnation claims brought in the context of a federal civil rights action. The plaintiff in that case asserted a regulatory taking claim and requested that the jury be allowed to determine whether such a taking had occurred. In rejecting this argument, the Eleventh Circuit explained that it had "discovered no indication that the rule in regulatory takings cases differs from the general eminent domain framework in which issues pertaining to whether a taking has occurred are for the court, while damage issues are the

province of the jury." 95 F.3d at 1092. On this basis, the Eleventh Circuit concluded that "no jury had to be empanelled for the regulatory takings claim." *Id.*

In reaching its decision that inverse condemnation liability issues were for the court to decide, the Eleventh Circuit was following consistent precedent developed in the context of both direct and inverse condemnation cases. This Court has recognized that, in direct condemnation actions, only the issue of just compensation is for the jury; all other issues are for the court.[1] *United States v. Reynolds*, 397 U.S. 14, 18 (1970) ("For it has long been settled that there is no constitutional right to a jury trial in eminent domain proceedings."). State courts have adopted this same principle under state constitutions: there is generally no right to trial by jury in condemnation actions except insofar as that right is specifically enforced by statute or rule. E.L. Kellett, Annotation, *How To Obtain Jury Trial In Eminent Domain: Waiver*, 12 A.L.R. 3d 7, 11 (1987) ("Generally, trial by jury in eminent domain proceedings is not guaranteed by the federal or state constitutions.")

The Ninth Circuit's decision and its conflict with the Eleventh Circuit's decision in *New Port Largo, Inc.*, pose a great risk of seriously complicating the adjudication of

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[1] This Court has also recognized that inverse condemnation actions arise out of the same constitutional requirement that just compensation be paid for property being taken for public use and that inverse condemnation actions are essentially eminent domain proceedings initiated by the property owners. *See Agins v. City of Tiburon*, 447 U.S. 255, 258 n. 2 (1980).

inverse condemnation matters in both state and federal courts. Other circuits called upon to address this issue will be faced with two squarely inconsistent decisions. Although the Ninth Circuit had the opportunity to try to reconcile its decision with the decision in *New Port Largo, Inc.*, it made no effort to do so because no such reconciliation is possible.

The confusion likely to be spawned by the Ninth Circuit's decision will extend into the state courts as well. State courts have regularly ruled that there is no right to have a jury decide liability issues in a regulatory takings case. *See, e.g., Hensler v. City of Glendale*, 8 Cal. 4th 1, 15 876 P.2d 1043, 1052 (1994); *Brock v. State Highway Commission*, 195 Kan. 361, 366, 404 P.2d 934, 940 (1965). By concluding that a plaintiff has a right to have a jury decide all issues in a federal regulatory takings claim brought under 42 U.S.C. § 1983, the Ninth Circuit's decision raises the risk of confusion and inconsistency between state and federal treatment of such claims. The potential for such confusion is especially significant in light of this Court's repeatedly expressed preference that regulatory takings claims should first be submitted to state tribunals for adjudication as a condition precedent to federal court review. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-197 (1987). It would be highly anomalous, to say the least, to require adjudication of regulatory takings claims in state courts where state law and procedure precludes jury resolution of such claims but then require a jury trial in any related federal court proceeding arising from the same dispute.

One need look no further than this Court's prior decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) for an illustration as to how the Ninth Circuit's decision will confuse and complicate the litigation of takings claims. *Dolan* cited to a number of state court decisions that had previously addressed the issue of the nexus required to support dedication requirements or other exactions. 512 U.S. at 390-391. Invariably, these state courts had treated this issue as one for the courts, not for a jury. *See, e.g., City of College Station v. Turtle Rock Corp*, 680 S.W. 2d 802, 804 (Tex. 1982) ("The question of whether a police power regulation is proper or whether it constitutes a compensable taking is a question of law and not a fact.") Yet, the Ninth Circuit decision would indicate that challenges to exactions under Section 1983 must be submitted to a jury.

The Ninth Circuit's decision to allow a jury to determine inverse condemnation liability as a factual matter is also inconsistent with prior decisions of this Court and the other circuits which have treated such issues as mixed questions of fact and law to be decided by courts. This Court has previously determined the legal question of whether a taking had occurred by giving essentially *de novo* review of the lower court's liability determinations. For example, in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), this Court (as well as the two state appellate courts that previously considered the takings issue in that case) gave no deference to the trial court's findings of liability and ruled that, as a matter of law, the regulation in question permitted a reasonable beneficial use of the property. 438 U.S. at 137-138. *See also Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595-597 (1962). Similarly, various circuits have held that courts,

and not juries, should resolve mixed questions of law and fact that implicate constitutional concerns in the land use context. *See Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 682 (3rd Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); *Greenbriar v. City of Alabaster*, 881 F.2d 1570, 1578 (11th Cir. 1989).

This Court has recognized the importance of maintaining judicial control over important constitutional standards. *Ornelas v. United States*, ___ U.S. ___, 116 S. Ct. 1657, 1662 (1996). This requires that even ad hoc inquiries that involve mixed questions of fact and law should be treated as legal questions to be decided by the courts where doing so will increase consistency and clarity of constitutional principles. *Id.* at 1662-1663. Allowing juries to decide the meaning of standards such as whether a land use decision "substantial advances" a public purpose or deprives a property of all "economically viable use" would be contrary to these goals.

II. THE NINTH CIRCUIT'S DECISION THAT THE JURY COULD DETERMINE INVERSE CONDEMNATION LIABILITY BY APPLYING A REASONABLENESS STANDARD TO CONFLICTING EVIDENCE FUNDAMENTALLY ALTERS THE ROLE OF THE CONSTITUTION IN THE REVIEW OF LOCAL LAND USE POLICIES AND DECISIONS.

The Ninth Circuit's decision in this case fundamentally changes and expands the role of the Fourteenth Amendment and Section 1983 in the review of local land use policies and decisions. It does so by changing the standard of constitutional review in regulatory takings

cases from one of "rational relationship" between the challenged action and public purpose, which reflects deference to local decisionmakers, to one of "reasonableness" with the jury free to find liability if it disagrees with the conclusion reached by the local legislative body based upon essentially the same evidence.[2]

For many years, this Court has held that, in a regulatory takings context, inverse condemnation liability exists if the challenged action fails to substantially advance a legitimate public purpose. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1960). In regulatory situations, the local agency meets this standard so long as there exists a reasonable relationship between the challenged action and a legitimate public concern. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

By its nature, this standard of liability is highly deferential to local public entities. It had its origins in principles of substantive due process and the arbitrary and capriciousness standard. So long as there was some basis

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[2] The jury was asked to determine inverse condemnation liability under two theories: a) whether the City's decision substantially advanced a legitimate public purpose; and b) whether the City's decision deprived the property of all economically viable uses. Because the jury's verdict did not indicate which of these theories formed the basis of its liability finding, the Ninth Circuit recognized that the jury's inverse condemnation verdict could be upheld on appeal only if it were legally supportable under both theories. Accordingly, the Ninth Circuit's formulation of an erroneous reasonableness standard to uphold the jury's liability finding on one of these two theories of liability was critical to its affirmance of the judgment.

for the local agency's conclusion or it was "at least debatable" that the challenged action related to a legitimate goal, it would not be constitutionally infirm. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1973); *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927). This deferential standard was essential to ensure that federal courts and federal law did not displace the authority and discretion properly belonging to local decisionmakers. *See Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1389 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1400 (1994); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988).

The Ninth Circuit's decision fundamentally changes this deferential standard. The court permitted the jury to declare the City's action to be constitutionally defective so long as it concluded, based upon conflicting evidence, that the City's determination that various concerns had not been satisfied was unreasonable. This unprecedented standard of constitutional review exposes local public bodies to federal inverse condemnation liability any time a jury chooses to reject evidence supporting the local decision and to accept other evidence that the local agency found unpersuasive.

In effect, the panel's decision would allow any jury to become a "zoning board of appeal under federal law" with the power to impose constitutional liability if it chooses to reject the evidence relied upon by the local public entity and conclude that the entity's action was unreasonable. In the present case, for example, the record demonstrates that City Council was presented with substantial evidence from state and federal regulatory bodies and others that the proposed development would harm

sensitive habitat. Respondents presented contrary evidence. Under the traditional reasonable relationship test, the City's action could not be found unconstitutional merely because the court or jury chose to accept the property owner's evidence that it had adequately mitigated the environmental impacts. However, by establishing a new standard of liability that permits a jury to reweigh the evidence and apply *de novo* review of the City's decision, the panel has fundamentally and erroneously changed the scope of constitutional review of local land use decisions.

The Ninth Circuit's adoption of a reasonableness test as the constitutional standard of review has implications for virtually all land use decisions made by public agencies. Almost invariably, significant development proposals will raise a number of legitimate public concerns and the information considered by the local decisionmaking body will be in conflict as to the magnitude of these concerns and the extent to which they have been mitigated. The Ninth Circuit's standard allows any party to mount a successful constitutional challenge to any denial of a project merely by showing that the local decisionmaker acted unreasonably in rejecting the evidence favoring development. Essentially, the Ninth Circuit has replaced the deferential standard of review which requires only a rational relationship between a legitimate concern and the challenged decision with a standard that allows *de novo* review by a jury of the evidence considered and rejected by the local decisionmaker.

The extraordinary result of the panel's application of this new standard is made stark by comparing the panel's review of the jury's decision with the district court's

decision on the analogous substantive due process claim, which was not challenged by Respondents. Based upon the same evidence considered by the jury, the district court decided, as a matter of law, that the City had not acted arbitrarily and "was not attempting to forestall all reasonable development." The district court concluded that the City was acting in good faith and that there was substantial evidence supporting the City's concern that habitat protection concerns had not been met. Pet. App. A36-A43. Yet, the panel allowed the jury finding of inverse condemnation liability to stand merely because Respondents had presented evidence (apparently accepted by the jury) that the City's decision was unreasonable and would not permit development.

III. THE NINTH CIRCUIT'S DECISION CONSTITUTES AN ERRONEOUS AND UNWARRANTED EXPANSION OF THE ROUGH PROPORTIONALITY TEST ADOPTED BY THIS COURT IN *DOLAN V. CITY OF TIGARD*.

While the jury was asked in jury instructions to determine whether the City's action bore a reasonable relationship to any legitimate public purpose, the panel's decision upholding inverse condemnation liability does not apply this standard. Rather, the panel imposes a new and different standard based upon *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which was decided by the Supreme Court months after the jury reached its verdict in the present case. The panel concluded that the City's action must not only further a legitimate public purpose but that the action must also be "roughly proportional" to that

purpose. Pet. App. A16. ("Even if the City had a legitimate interest in denying Del Monte's development, its actions must be 'roughly proportional' to furthering that interest.")

As a matter of law, the panel's extension of the *Dolan* holding into the regulatory takings context of the present case was inappropriate. *Dolan* arose in the context of a land use decision that had required that a landowner dedicate property to a public entity and provided a standard for determining whether such a dedication would be excessive. Central to the *Dolan* analysis is the distinction between land use regulation and governmental actions that require that an interest in the property be given to the public agency. As explained by the Chief Justice in explaining the rationale of *Dolan* and the Court's prior decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987):

> The sort of land use regulations discussed in the [regulatory takings] cases just cited . . . differ from the present case. . . . [T]he conditions imposed were not simply a limitation on the use petitioner might make of her own parcel but a requirement that she deed portions of her property to the city.

512 U.S. at 385.

Dolan did not purport to establish a new standard of liability in all regulatory takings cases. In articulating its rough proportionality standard, *Dolan* expressly stated that the city in that case "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." 512 U.S. at 391. Thus, by its own

terms, this standard was applied only to a challenged exaction, and nothing in *Dolan* suggests that its holding changed the settled standard of inverse condemnation liability in regulatory taking cases that a challenged action need only bear a reasonable relationship to a legitimate public purpose. *See, e.g., Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) ("Based on a close reading of *Nollan* and *Dolan*, we conclude that these cases (and the tests outlined therein) are limited to the context of development exactions where there is a physical taking or its equivalent.").

The Ninth Circuit's decision takes the *Dolan* "rough proportionality" standard and applies it in an entirely different context. The Ninth Circuit extended *Dolan* to measure the constitutionality of the City's regulatory decision to deny Respondents' proposed development. The basis for that denial was not Respondents' unwillingness to convey property interests demanded by the City. Rather, the denial was based upon the City's determination that the proposed development posed unacceptable environmental impacts that would not be mitigated by Respondents.

Applying the rough proportionality standard in regulatory contexts such as this would constitute a major departure in the constitutional review of such decisions. Any dissatisfied property owner could challenge rationally-based land use regulations or decisions that had appropriate goals by claiming that the concerns underlying the decision were not roughly proportional to the impacts of the proposed development. Thus, for example, a local legislative decision to deny a project based upon concerns that the proposed project did not adequately

address risks of earth movement could be constitutionally challenged on the ground that these concerns were not roughly proportional to the impacts of the project. Similarly, a regulatory decision that a proposed development had not mitigated traffic problems could be rendered constitutionally infirm unless the deciding body established that its concerns were roughly proportional to the traffic impacts of the project.

In and of itself, extending the rough proportionality standard into the context of regulatory decides is an erroneous and unwarranted expansion of constitutional review over land use decisionmaking. When combined with the Ninth Circuit's application of a reasonableness standard that allowed a jury to give *de novo* review of the City's decision, the Ninth Circuit's decision improperly federalizes land use planning and exposes local decisionmakers across the country to great uncertainty and unwarranted liability.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve a conflict among the circuits and to provide clear guidance to both federal and state courts as to the appropriate federal standards of review and liability in regulatory takings cases.

Respectfully submitted,

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January 1998

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEL MONTE DUNES AT MONTEREY, LTD., et al., *Plaintiff-Appellee,* v. CITY OF MONTEREY, *Defendant-Appellant.*	No. 94-16248 D.C. No. CV-86-05042-CAL
DEL MONTE DUNES AT MONTEREY, LTD., and MONTEREY-DEL MONTE DUNES CORPORATION, *Plaintiffs-Appellants,* v. CITY OF MONTEREY, *Defendant-Appellee.*	No. 94-16313 OPINION

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted
November 16, 1995 – San Francisco, California

Filed September 13, 1996

Before: J. Clifford Wallace and Edward Leavy, Circuit Judges, and Lourdes G. Baird,* District Judge

Opinion by Judge Wallace

COUNSEL

George A. Yuhas, Orrick, Herrington & Sutcliffe, San Francisco, California, for the defendant-appellant-cross-appellee.

Frederik A. Jacobsen, San Mateo, California, for the plaintiffs-appellees-cross-appellants.

J. Matthew Rodriguez, Deputy Attorney General, Sacramento, California, for the amicus.

OPINION

WALLACE, Circuit Judge:

The City of Monterey (City) appeals from a district court judgment following a jury verdict in favor of Del Monte Dunes at Monterey, Ltd. and Monterey-Del Monte Dunes Corporation (collectively Del Monte), and a district court order denying the City's motions for judgment as a matter of law and for a new trial. Del Monte cross-appeals from the district court's decision limiting available damages. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291, and we affirm.

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* Honorable Lourdes G. Baird, United States District Judge, Central District of California, sitting by designation.

I

Del Monte brought this civil rights action against the City alleging, among other things, violations of due process and equal protection as a result of the City's taking of Del Monte's property. The property at issue consists of approximately 37.6 ocean-front acres located in the City, commonly referred to as Del Monte Dunes (Dunes).

In 1981, Ponderosa Homes, which subsequently sold the Dunes to Del Monte, applied to the City for a permit to develop the Dunes into a 344-unit residential complex. The City rejected the application. Ponderosa Homes then submitted three more applications for 264, 224, and 190-unit residential developments, all of which could have conformed with the City's general land-use plan and zoning ordinances. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1499 (9th Cir. 1990) (*Del Monte Dunes I*). While the last application was pending, Del Monte purchased the Dunes and continued pursuing the application, which the City eventually denied in 1986. The lengthy application process and numerous conditions for approval the City imposed on Del Monte are detailed in our earlier decision reversing in part the district court's dismissal of Del Monte's claims. *See id.* at 1499-1506, 1509.

Prior to trial, the district court ordered all reinstated issues tried to a jury, save for those related to Del Monte's substantive due process claim, which the court determined presented only legal issues. Following a trial, the jury found that the City's actions denied Del Monte equal protection and resulted in an unconstitutional taking; it awarded Del Monte $1,450,000. The district court held

that the City did not violate Del Monte's substantive due process rights because the City asserted valid regulatory reasons for denying Del Monte's development application. The latter decision is not disputed. The district court then entered judgment in favor of Del Monte.

The City moved the district court for a judgment as a matter of law and for a new trial as to both the equal protection and inverse condemnation claims. The district court denied these motions, and this appeal followed.

The City argues that the court rather than the jury should have decided Del Monte's equal protection and taking claims. As to the equal protection claim, the City contends that its liability presents a mixed issue of law and fact and as such should have been decided by the court. As to the inverse condemnation claim, the City contends that there is no right to a jury trial for such claims. The City therefore asserts that it is entitled to a new trial. Alternatively, the City argues that it is entitled to a judgment as a matter of law on both the equal protection and inverse condemnation claims. Finally, the City contends that the district court should have ordered a new trial on damages because certain evidence relating to damages was erroneously admitted, resulting in an excessively large award.

On cross-appeal, Del Monte argues that the district court improperly denied it damages for loss of return and loss of value. At oral argument, Del Monte stated it would waive this argument in the event we affirmed the district court's judgment.

II

At the outset, we consider whether reversal of either the inverse condemnation claim or the equal protection claim would require a new trial. The district court instructed the jury on two separate claims. First, the district court addressed Del Monte's takings claim, instructing the jury that it should find for Del Monte if (1) all economically viable use of the property had been denied; or (2) the City's decision to reject Del Monte's development application did not substantially advance a legitimate public purpose. The court stated: "[I]f you find that either of these things has been proved, your verdict indeed is for the plaintiff on this taking claim."

Second, the district court instructed the jury on the equal protection claim, requiring it to bring back a judgment for Del Monte if (1) property similarly situated; (2) received different treatment from the City; and (3) no rational basis accounted for the differential treatment. "If you find that each of these elements has been proved by a preponderance of the evidence, your verdict should be for the plaintiff on the equal protection claim." Thus, the jury was charged separately on the taking and equal protection claims.

This case does not present the interplay of a general verdict and alternative theories of liability. *See Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1373 (9th Cir. 1987) (*Landes*). Rather, we are presented with a damages award that resulted from the City's liability for both the takings and the equal protection claims. *See id.* (distinguishing *Syufy Enter. v. American Multicinema*, 793 F.2d 990, 1001-02 (9th Cir. 1986) (*Syufy Enterprises*) (general

verdict usually upheld only if substantial evidence supports each and every theory of liability submitted to the jury), *cert. denied*, 479 U.S. 1031 (1987)). The district court instructed the jury that if it found the City liable for *any* constitutional violation, it should award Del Monte damages "in an amount that will compensate [Del Monte] for the delay [proximately] caused by the City's action." We therefore can affirm the judgment and verdict if we determine that substantial evidence supports either the inverse condemnation or equal protection claims. *See Landes*, 833 F.2d at 1373. If we hold that the inverse condemnation claim and resultant damages can be affirmed, we need not consider the City's arguments concerning the equal protection claim.

III

We next review the district court's denial of the City's motion for a new trial. We review a district court's denial of a motion for new trial for an abuse of discretion. *California Sansome Co. v. U.S. Gypsum*, 55 F.3d 1402, 1405 (9th Cir. 1995) (*California Sansome*). Entitlement to a jury trial and a trial court's submission of an issue to the jury, however, are legal questions which we usually review de novo. *See KLK, Inc. v. United States Dep't of Interior*, 35 F.3d 454, 455 (9th Cir. 1994) (*KLK*) (reviewing de novo submission of just compensation issue to the jury). "Little turns [ ] on whether we label review of this particular question abuse of discretion or *de novo*, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law." *Koon v.*

United States, Nos. 94-1664, 94-8842, 1996 WL 315800, at *13 (U.S. June 13, 1996) (citation omitted).

A.

The City first argues that because Del Monte had no right to a jury trial on its inverse condemnation claim pursuant to either 42 U.S.C. § 1983 or the Seventh Amendment, the court rather than the jury should have determined whether the City's actions effected an unconstitutional taking. We are required to determine first whether Del Monte was entitled to a jury trial pursuant to section 1983 before we consider whether the Seventh Amendment guarantees a jury trial under the present circumstances. *See Lorillard v. Pons*, 434 U.S. 575, 577 (1978) (*Lorillard*) (courts should avoid the Seventh Amendment question if a statute provides a right to jury trial).

Section 1983 allows persons deprived of rights secured by laws of the United States to bring "an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. The statute is silent with respect to whether plaintiffs have a right to a jury trial in actions brought pursuant to it. We must therefore now discuss whether Congress intended this statute to create a right to trial by jury. *See Lorillard*, 434 U.S. at 580.

Congress enacted section 1983 in 1871. Mirroring the split then existing between courts of law (trial by jury) and courts of equity (bench trial), section 1983 gives aggrieved parties the right to bring an "action at law" or a "suit in equity." Logically then, plaintiffs who bring an action at law under section 1983 have the right to a jury

trial. *See id.* at 583 (inferring statutory right to jury trial under ADEA because Congress provided specifically for "legal" relief).

Having held that section 1983 provides a jury trial for actions at law, we must next determine whether Del Monte's inverse condemnation action is one at law. Because section 1983 and the Seventh Amendment contain similar language, *see* U.S. Const. amend. VII (providing jury trial for "suits at common law"), we look to Seventh Amendment jurisprudence to assist our determination. We must ask whether an inverse condemnation claim can be compared to "suits at common law." *See Spinelli v. Gaughan*, 12 F.3d 853, 855 (9th Cir. 1993) (*Spinelli*) (jury right not limited to actions that actually existed at common law, but extends to actions analogous thereto); *Smith v. Barton*, 914 F.2d 1330, 1337 (9th Cir. 1990) (*Barton*), *cert. denied*, 501 U.S. 1217 (1991). To determine whether an inverse condemnation claim is analogous to a common-law action, we examine "the nature of the action and the remedy sought." *Barton*, 914 F.2d at 1337; *see also Spinelli*, 12 F.3d at 855.

As to the nature of the action, the City and amicus State of California argue that inverse condemnation actions are analogous to eminent domain actions, for which there is no right to a jury trial. Eminent domain proceedings, however, are actions at law. 5 James Wm. Moore, Moore's Federal Practice ¶¶ 38.12[5], 38.32[1] (2d ed. 1995). Such proceedings are not tried before a jury because the United States traditionally is a party. *Id.* ¶ 38.32[1]; *see also KLK*, 35 F.3d at 456. Thus, merely because inverse condemnation actions are similar to eminent domain actions, *see Agins v. City of Tiburon*, 447 U.S.

255, 258 & n.2 (1980), does not necessarily lead to the result that they are not "actions at law" triable by a jury.

Indeed, the similarities between eminent domain and inverse condemnation suggest that the latter derives from common law. Eminent domain has been characterized as a "trespass committed by the sovereign, and lawful only on the condition that the damages inflicted by the trespass are paid to the injured party." *Beatty v. United States*, 203 F. 620, 626 (4th Cir. 1913), *cert. denied*, 232 U.S. 463 (1914). Actions brought for trespass are common-law actions. 5 Moore's Federal Practice ¶ 38.11[5]. Similarly, both eminent domain and inverse condemnation actions resemble common-law actions for trover to recover damages for conversion of personal property, and detinue and replevin. *See id.*

More important than the nature of the claim is the second inquiry: the type of remedy sought. *Spinelli*, 12 F.3d at 855-56; *Barton*, 914 F.2d at 1337; *see also Tull v. United States*, 481 U.S. 412, 421 (1987). Del Monte seeks compensatory or "legal" damages. *See Barton*, 914 F.2d at 1337, *citing Curtis v. Loether*, 415 U.S. 189, 196 (1974). Because legal relief is available and legal rights are asserted, we conclude that Del Monte's inverse condemnation action is an "action at law." *See* 42 U.S.C. § 1983; *Lorillard*, 434 U.S. at 583. Thus, Del Monte was entitled to have a jury try its inverse condemnation claim.

The City also argues that, even if Del Monte's inverse condemnation claim is a common-law action, Federal Rule of Civil Procedure 71A requires the district court to determine liability. Rule 71A, however, applies only to eminent domain proceedings. *KLK*, 35 F.3d at 457.

Because we hold that the district court did not err by allowing Del Monte's section 1983 action to be tried before a jury, we conclude that it properly denied the City's motion for a new trial based on the opposite contention.

B.

The City next argues that regardless of whether section 1983 provides a right to a jury trial, the district court should not have submitted the issue of liability to the jury because it presents questions of law. Before addressing the merits of this argument, we point out that even if the district court improperly submitted an issue of law to the jury, the City's remedy is not necessarily a new trial. We may remand to the district court for it to enter necessary factual findings and conclusions of law. *See* 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2887 at 476 (1995).

To prevail on its inverse condemnation claim, Del Monte had to show that the City's actions (1) did not substantially advance a legitimate public purpose; or (2) denied it economically viable use of its property. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987). The jury's verdict on Del Monte's inverse condemnation claim did not differentiate between the two theories of liability; we may uphold the verdict on that claim if substantial evidence supports each theory of liability. *Syufy Enterprises*, 793 F.2d at 1001. We first examine whether the district court properly submitted each of the above theories to the jury.

No circuit precedent directly addresses whether a jury may decide these issues. Both inquiries present mixed questions of law and fact, which may be submitted to the jury if they are essentially factual, even if they implicate constitutional rights. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 288-90 (1982) (discriminatory intent in a civil rights action is question of fact); *United States v. Moreno*, 742 F.2d 532, 537 (9th Cir. 1984) (*Moreno*) (Wallace, J., concurring) (Fourth Amendment seizure issue appropriate for the trier of fact); *cf. United States v. McConney*, 728 F.2d 1195, 1202-04 (9th Cir.) (en banc) (*McConney*) (standard of review applied to mixed questions of law and fact depends on whether inquiry is "essentially factual"), *cert. denied*, 469 U.S. 824 (1984); *but see Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (*Bateson*).

In the more specific context of eminent domain and inverse condemnation, the Supreme Court has provided some insight into the nature of Del Monte's claim. For example, the Court has repeatedly observed that whether government action has deprived a claimant of his property without just compensation is an "essentially ad hoc, factual inquir[y]." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (*Lucas*); *see also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (*Penn Central*); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 473-74 (1987); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Thus, we begin with some direction: the questions presented here ordinarily are essentially factual. This points us toward the use of the jury despite the questions being ones of mixed law and fact.

With this background, we turn first to determining whether the existence of an economically viable use falls within the category of essentially factual questions, which may be submitted to a jury. We hold that it does. *See Williamson Cy. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 182-83 (1985) (recognizing jury finding of no economically viable use); *see also Yee v. City of Escondido*, 503 U.S. 519, 523 (1992) (economically viable use inquiry "necessarily entails complex factual assessments"); *Sadowsky v. City of New York*, 732 F.2d 312, 317 (2d Cir. 1984) (*Sadowsky*) (whether a taking has occurred is essentially a factual inquiry). Thus, even though this inquiry presents a mixed question of fact and law, the district court did not err by submitting it to the jury.

We next turn to the second theory of liability for inverse condemnation: whether the City's actions substantially advanced a legitimate public purpose. The City urges us to analogize this inquiry to that undertaken by courts addressing substantive due process claims, which the City submits must be determined by the court. But our precedent does not provide a clear answer as to whether substantive due process claims are jury questions. *Compare Bateson*, 857 F.2d at 1302-03 (reviewing de novo issue whether government actions were "arbitrary or capricious" for purposes of establishing substantive due process claim in takings context), *with Hoeck v. City of Portland*, 57 F.3d 781, 786 (9th Cir. 1995) (concluding that no reasonable jury could have found that the government violated plaintiff's substantive due process rights in takings context), *cert. denied*, 116 S. Ct. 910 (1996). Thus, the

City's analogy does not help us. Rather, referring to eminent domain and inverse condemnation cases appears to us to be a safer course.

In this case, the district court instructed the jury that the City's actions must substantially advance a legitimate public purpose. As there was no objection to how the court framed the instruction, we may begin our analysis of whether the issue is essentially factual by focusing on the instruction itself. The court stated:

> **Public bodies, such as the city, have the authority to take actions which substantially advance legitimate public interest and legitimate public interest can include protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development. So one of your jobs as jurors is to decide if the city's decision here substantially advanced any such legitimate public purpose.**
>
> **The regulatory actions of the city or any agency substantially advances a legitimate public purpose if the action bears a reasonable relationship to that objective.**
>
> **Now, if the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the claims proposal and legitimate public purpose, you should find in favor of the plaintiff. If you find that there existed a reasonable relationship between the city's decision and a legitimate public purpose, you should find in favor of the city. As long as the regulatory action by the city substantially advances their legitimate public**

> purpose, and its underlying motives and reasons are not to be inquired into.
>
> Now, in analyzing whether plaintiff's right to compensation has been violated, that is the property was taken, you are entitled to consider the [extent] to which the city, in its regulation, interfered with the plaintiff's reasonable distinct investment back[ed] expectations. So those are your instructions of the law with respect to the taking . . . claim.

The jury was instructed to find that the City's actions substantially advanced a legitimate state interest if it found that there was a "reasonable relationship" between the City's denial of Del Monte's application and a legitimate public purpose. The legitimate purposes – a legal determination – were defined in the instructions. The jurors were left with a reasonableness determination: was the denial reasonably related?

The nature of this reasonableness determination was clarified by the Supreme Court in its most recent venture into the issue before us. In *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (*Dolan*), the Court acknowledged that most state courts used the "reasonable relationship" test in determining the necessary nexus between legitimate governmental interests and a permit condition. *Id.* at 2319. The Court did not disapprove this test but, for Fifth Amendment purposes, proposed "rough proportionality" as an adequate term. *Id.* The Court advised that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at

2319-20. This description seems to indicate that the inquiry is essentially factual. *See also id.* at 2321 ("We conclude that the findings upon which the city relies do not show the required reasonable relationship. . . . ").

As the district judge pointed out, whether the issue of advancement of a legitimate public purpose is one for the jury or court is close. However, the issue submitted to the jury was largely a reasonableness inquiry; whether the government's actions are "reasonable" is often a jury issue. *See, e.g., Chew v. Gates*, 27 F.3d 1432, 1443 (9th Cir. 1994) (whether release of police dog on individual was reasonable under the Fourth Amendment is a question for the jury), *cert. denied*, 115 S. Ct. 1097 (1995); *Turnbull v. Kincheloe*, 987 F.2d 589, 593 (9th Cir. 1993) (whether prisoner searches are reasonably related to legitimate penological goal is question for the jury); *Parks v. Watson*, 716 F.2d 646, 654 n.4 (9th Cir. 1983) (whether city's action was rationally related to a public purpose is question of fact).

Because the reasonableness issue in this case is essentially "fact-bound [in] nature," *Moreno*, 742 F.2d at 537 (Wallace, J., concurring), is "essentially factual," *McConney*, 728 F.2d at 1202, and is founded largely "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct," *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960), we conclude that, although a mixed question of fact and law, it is the type of issue that can be put to the jury. The district court did not err.

IV

We next review de novo the district court's denial of the City's motion for judgment notwithstanding the verdict on Del Monte's inverse condemnation claim. Our role is the same as that of the district court. *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1460 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2163 (1994). Judgment in favor of the City is proper if the evidence, construed in the light most favorable to Del Monte, permits only one reasonable conclusion, and that conclusion is contrary to the jury's. *See Bank of the West v. Valley Nat'l Bank of Arizona*, 41 F.3d 471, 477 (9th Cir. 1994).

A.

"[T]he Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Lucas*, 505 U.S. at 1016 (internal quotations and emphasis omitted). Even if the City had a legitimate interest in denying Del Monte's development application, its action must be "roughly proportional" to furthering that interest. *Dolan*, 114 S. Ct. at 2319. That is, the City's denial must be related "both in nature and extent to the impact of the proposed development." *Id.* at 2319-20. For the purposes of reviewing the district court's denial of the City's motion for judgment notwithstanding the verdict, we assume that the City's stated interests of protecting the environment and health and safety of its citizens were legitimate. *See Penn Central*, 438 U.S. at 125 (health and safety concerns are legitimate public purposes); *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 169

(4th Cir. 1991) (protection and preservation of beach areas are legitimate public purposes), *cert. denied*, 505 U.S. 1219 (1992).

To show that the essential nexus between the City's actions and its interests was lacking, Del Monte presented evidence that none of the City's stated reasons for denying its application was sufficiently related to the City's legitimate interests. The City first denied Del Monte's application because the proposed development would require sand relocation and grading in the "bowl" area of the property, which was the lowest lying area, roughly near the property's center. According to the City, such disruptions would result in "significant environmental impacts that are not mitigable nor adequately addressed." *See Del Monte Dunes I*, 920 F.2d at 1504. Del Monte presented evidence, however, that not only had the City Council and the Department of Public Works previously approved the grading plan, but numerous studies showed that the environmental impact on the Dunes caused by grading was either not significant or mitigated by the dedication of other areas of the Dunes to open space.

Second, the City denied Del Monte's permit because it determined that the proposed development would have significant impacts on the native flora and fauna, which were not adequately mitigated by the proposal. *Id.* Del Monte presented the jury with evidence that the proposed development would not significantly harm the property's environmental balance. It also reminded the jury that the City had already approved Del Monte's environmental restoration plan in 1984 and that Del Monte had complied with the planning staff's request to

ensure that environmental damage was unlikely. The jury was entitled to credit Del Monte's experts, and discredit the City's testimony. *See Oviatt v. Pearce*, 954 F.2d 1470, 1473 (9th Cir. 1992) (*Oviatt*).

Third, the City denied Del Monte's application because it determined that the proposed development did not provide adequate access to and from the property. *Del Monte Dunes I*, 920 F.2d at 1504. Del Monte and the City presented conflicting evidence as to who had responsibility for providing access. Del Monte's architect, Paul Davis, testified that Del Monte's access plan merely relied on what the City had told Del Monte it wanted. The City's plan would have required Del Monte to construct an access road that crossed property belonging to other landowners. Del Monte contends that the City had known this since 1982 or 1983, but that it had done nothing to condemn the property needed for the access road. Because development of the access road depended on the *City* taking further action, Del Monte argued it was an improper reason to deny its development permit.

Fourth, the City denied Del Monte's application because it determined that the proposed development was "likely to cause substantial environmental damage and substantially injure the habitat of the endangered Smith's Blue Butterfly." *Id.* Del Monte's environmental expert, Dr. Donald Bright, testified to the contrary. He first testified that he and his team had located only one Smith's Blue Butterfly on the property, in 1984. He then testified that he did not believe that the proposed development would jeopardize the continued existence of the Smith's Blue Butterfly, which confirmed the conclusion already reached by the United States Fish and Wildlife

Service. In January 1986, a staff report to the City Planning Commission concluded that Dr. Bright's restoration plan satisfied the environmental conditions previously imposed in 1984.

Fifth, the City denied Del Monte's application because it determined that the proposed project was not in conformance with the General Plan as it did not protect native flora and fauna. *Id.* Davis testified that nothing but the size of the proposed project changed between 1984, when the City conditionally approved Del Monte's application, and 1986, when the City finally denied it. Davis further testified that the City's environmental impact report of 1982 found no significant impact to native flora and fauna as a result of Ponderosa Homes' 344-unit proposed development; thus, it made little sense to find significant impact due to the smaller, 144-unit proposed development.

Finally, the City summarily stated that Del Monte's project would have a "significant impact on the environment, and no demonstration of overriding considerations has been made which would support approval of this project." *Id.* at 1504-05. This factor appears duplicative of other reasons given for the City's denial of Del Monte's application concerning preservation of habitat for the Smith's Blue Butterfly and other native flora and fauna.

We conclude that Del Monte provided evidence sufficient to rebut each of these reasons. Taken together, Del Monte argued that the City's reasons for denying their application were invalid and that it unfairly intended to forestall any reasonable development of the Dunes. *See id.* at 1508. In light of the evidence proffered by Del Monte,

the City has incorrectly argued that no rational juror could conclude that the City's denial of Del Monte's application lacked a sufficient nexus with its stated objectives. Significant evidence supports Del Monte's claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development. *See Dolan*, 114 S. Ct. at 2319.

B.

The jury also could have found the City liable for a taking because it denied Del Monte all economically viable use of its property. Where such a taking is absolute, no inquiry into the state's interests advanced in support of the regulation is required. *Lucas*, 505 U.S. at 1015-16; *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 473 n.4 (9th Cir. 1994). The Supreme Court has suggested that where an owner is denied only some economically viable uses, a taking still may have occurred where government action has a sufficient economic impact and interferes with distinct investment-backed expectations. *Lucas*, 505 U.S. at 1019-20 n.8; *see also Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 616 (9th Cir. 1993) (*Outdoor Systems*), *citing Penn Central*, 438 U.S. at 124. Traditionally, the type of governmental interference also is considered a factor relevant to the takings inquiry. *See Penn Central*, 438 U.S. at 124.

"[T]he term 'economically viable use' has yet to be defined with much precision." *Outdoor Systems*, 997 F.2d at 616. Generally, however, the existence of permissible uses determines whether a development restriction denies a property owner economically viable use of his

property. *Id.* The Supreme Court explained in *Lucas* that this rule is justified because the "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017; *see also id.* ("For what is the land but the profits thereof?") (internal quotations and alterations omitted). Thus, compensation is required where regulations "leave the owner of land without economically beneficial or productive options for its use – typically . . . by requiring land to be left substantially in its natural state – [which suggests] that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 1018; *see also Dolan*, 114 S. Ct. at 2316.

The City initially argues that because Del Monte sold the Dunes to the State of California for $800,000 more than it paid, economically viable uses for the property must have existed. Thus, according to the City, the jury's finding that a taking occurred was precluded as a matter of law. However, it is not difficult to conceive of a circumstance in which there are no economically viable uses for a piece of property, but the property owner can sell it to the government at a higher price than what he paid for it. For example, in conjunction with a legislative moratorium on property development, a state might implement a "buy-out" program for environmentally sensitive property and purchase a landowner's property at a higher price than what the landowner originally paid. *See Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1320 & n.5 (D. Nev. 1992); *see also Lucas*, 505 U.S. at 1019 (listing federal and state statutes permitting acquisition of private lands for public use). A government buy-

out, of course, would not necessarily shield the government from the Takings Clause. Rather, the buy-out would likely implicate the issue of just compensation. Thus, a landowner who believed that the government bought out his property at an unfairly low price might choose to bring an action for just compensation. The fact that he already received some money from the government in return for his property does not establish as a matter of law that economically viable uses for his property remain or that a taking did not occur.

Focusing the economically viable use inquiry solely on market value or on the fact that a landowner sold his property for more than he paid could inappropriately allow external economic forces, such as inflation, to affect the takings inquiry. Indeed, several courts have found a taking even where the "taken" property retained significant value. *See, e.g., Resolution Trust Corp. v. Town of Highland Beach,* 18 F.3d 1536, 1549-50 & n.9 (11th Cir.), *vacated and reh'g en banc granted,* 42 F.3d 626 (11th Cir. 1994); *Yancey v. United States,* 915 F.2d 1534, 1541 (Fed. Cir. 1990) (no set formula for determining how much diminution in value effects a taking); *Bowles v. United States,* 31 Fed. Cl. 37, 48-49 (1994); *Formanek v. United States,* 26 Cl. Ct. 332, 340-41 (1992) (*Formanek*). Moreover, focusing solely on property values confuses the economically viable use inquiry with the diminution of value inquiry normally applied only where no categorical taking exists. *See Lucas,* 505 U.S. at 1019-20 n.8. Although the value of the subject property is relevant to the economically viable use inquiry, our focus is primarily on use, not value. *See Outdoor Systems,* 997 F.2d at 616 (existence of

permissible use determines whether economically viable use exists).

Similarly, the mere fact that there is one willing buyer of the subject property, especially where that buyer is the government, does not, as a matter of law, defeat a taking claim. *See Lucas,* 505 U.S. at 1018-20 & n.8 (implicitly rejecting a dissenter's view that the fact Lucas could have sold his property indicated no taking occurred); *see also Formanek,* 26 Cl. Ct. at 340 (offers for property for "far less than the value of the property prior to government action and '[ ] not the product of negotiations between a willing buyer and seller under no duress' " do not defeat taking claim). Rather, we are assisted by the test applied by the Second Circuit, which looks to "whether the property use allowed by the regulation is sufficiently desirable to permit property owners to sell the property to someone for that use." *Park Ave. Tower Assoc. v. City of New York,* 746 F.2d 135, 139 (2d Cir. 1984) (internal quotations omitted), *cert. denied,* 470 U.S. 1087 (1985); *Sadowsky,* 732 F.2d at 318. We modify that test slightly, however, to emphasize that where, as Del Monte argued in this case, government action relegates permissible uses of property to those consistent with leaving the property in its natural state (e.g., nature preserve or public space), and no competitive market exists for the property without the possibility of development, a taking may have occurred. *See Formanek,* 26 Cl. Ct. at 340; *see also Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency,* 561 F.2d 1327, 1330-31 (9th Cir. 1977) (taking occurs where property rendered unsaleable in the open market); Jed Rubenfeld, *Usings,* 102 Yale L.J. 1077, 1157 (1993) (discussing analogy between condemned land and land required to be left in

its natural state). We now apply these legal standards to the evidence Del Monte presented to the jury to determine whether sufficient evidence supports the jury's finding that the City's actions left Del Monte's property without an economically viable use.

Del Monte contended that the City denied it all economically viable use of the Dunes by requiring it to leave the property in its natural state. As such, Del Monte argued that the Dunes was desirable only to the City or the State, which eventually converted the property into a public park. In support of its argument, Del Monte presented evidence establishing that the City progressively denied use of portions of the Dunes until no part remained available for a use inconsistent with leaving the property in its natural state.

First, Del Monte demonstrated that the City denied it the ability to build on the western one-third of the property, which fronted the ocean, because the City wanted to retain that property for public beach use and access. Although we recognize that the California Coastal Act also requires set-backs when developing beachfront property, Del Monte contended that it agreed to provide public walkways and to construct a parking lot for public use only in response to the City's demands. Del Monte also agreed to create a buffer zone between its planned development and the existing State park on the Dunes' northern border.

Del Monte also showed that the City's viewshed restrictions denied it the ability to build on other portions of the Dunes. Del Monte's architect Davis testified at length as to the City's requirements that Del Monte create

"view corridors" such that the planned development could not be seen from the highway. Creating the view corridors required Del Monte to locate the development in the lowest elevated area of the property, also called the "bowl" area. Finally, Del Monte presented the jury with evidence that the City denied it any use of the bowl area because of the risk of damage to buckwheat plants, the natural habitat of the endangered Smith's Blue Butterfly.

Del Monte also presented evidence illustrating that it had complied with all fifteen conditions imposed by the City in its 1984 resolution granting Del Monte an extension on its conditional use permit. *See Del Monte Dunes I*, 920 F.2d at 1503. Del Monte also demonstrated, through the testimony of Davis and other experts, that its proposed 190-unit development complied with each of the City's bases for denying Del Monte's application in 1986. *See id.* at 1504, 1506 (concluding that Del Monte provided evidence that they substantially fulfilled the City's conditions). As a result of the City's denial of the development application, Del Monte concluded that the Dunes was no longer commercially marketable.

Because this evidence, viewed in the light most favorable to Del Monte, supports the jury's finding that the City's actions denied all economically viable use of the Dunes, we affirm the district court's denial of the City's motion for a judgment notwithstanding the verdict. The jury essentially accepted Del Monte's argument that the City forced Del Monte to bear the burden of creating open space for the public to enjoy. *See Dolan*, 114 S. Ct. at 2316.

The City also argues that the jury could not have concluded that the City's actions denied Del Monte all economically viable uses of the property because Del Monte failed to submit an application proposing a less-intrusive development. The City contends that "the evidence proffered by [Del Monte] provided no basis for a reasonable jury to conclude that the City Council's decision in June of 1986 precluded any future residential development or other use of the subject property." To the contrary, we already have held that Del Monte's taking claim was ripe because requiring Del Monte to submit a new application was futile. *Del Monte Dunes I*, 920 F.2d at 1502-06. Moreover, Davis and Del Monte's engineer, John Van Zander, testified that the combination of the City's requirements made any development of the Dunes impossible. Davis stated that after five years of negotiating with the City, he and others working on the development "felt basically that the door was shut, that the City Council did not want residential development on this site." He continued: "[T]here was no way of meeting any position of the City that [the Dunes] should be open space. There was no way of planning for any residential development on [the Dunes]. . . . There was no way to come back with a plan." Similarly, Van Zander told the jury that leaving areas available for public space, environmental habitat, and view corridors, made it impossible to design any plan for residential development of the Dunes. Viewing this evidence in the light most favorable to Del Monte, the jury could conclude that additional development applications would have been futile, as did we in *Del Monte Dunes I*.

In sum, we conclude that the jury was not compelled to find that the City's actions left Del Monte with an economically viable use of the Dunes. As the land was zoned for multi-unit residential use, once the jury determined that it was unusable for that purpose, it was entitled to conclude that the City's actions had effected a taking. *See Outdoor Systems*, 997 F.2d at 616-17 (including among property owner's permissible uses those permitted by state law); *see also Lucas*, 505 U.S. at 1017 n.7 (owner's reasonable expectations shaped by uses permitted by state law).

V

Finally, the City argues that the district court abused its discretion by denying its motion for a new trial because the jury awarded Del Monte excessive damages. Not only do we review the district court's denial of a motion for a new trial for an abuse of discretion, *California Sansome*, 55 F.3d at 1405, we allow substantial deference to a jury's finding of the appropriate amount of damages. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1360 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987). We must uphold the jury's finding unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork. *Id.*

The district court instructed the jury to determine damages in an amount that would compensate Del Monte for the delay the City caused in Del Monte's efforts to develop the Dunes. The jury awarded Del Monte $1,450,000. The City contends that these damages are

excessive because (1) the jury was permitted to consider delay damages for a period extended up to the date of trial; (2) Del Monte's experts' opinions on the property's value both before and after the City's actions were contrary to the weight of the evidence; and (3) Del Monte's experts were erroneously allowed to assume that there was a reasonable probability that the California Coastal Commission (Coastal Commission) would have approved Del Monte's proposed development.

The record refutes the City's arguments. First, the district court refused to decide the relevant length of time for determining delay damages, concluding that this was an issue for the jury. The City has no factual basis upon which to argue what length of the time the jury found relevant. Second, Del Monte's experts testified that the more progress Del Monte made in the application process the more valuable the Dunes became. The jury was entitled to infer from this evidence that Del Monte's progress toward permit approval, up until 1986 when the City conclusively denied the application, could account for an appreciation rate higher than the eight to ten percent Del Monte's experts said was an "average" rate of return.

Finally, the City's contention that Del Monte's experts erroneously assumed that the Coastal Commission would approve the development was refuted by expert testimony. There is ample evidence upon which the jury could conclude that approval by the Commission was likely. *See Oviatt*, 954 F.2d at 1473 (within the jury's province to determine credibility of witnesses).

Because the City has not shown that the damages award is grossly excessive, clearly not supported by the

evidence, or speculative, we affirm the district court's denial of the City's motion for a new trial on damages.

AFFIRMED.

APPENDIX B

VOLUME 4
PAGE 438 TO 561

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES A. LEGGE, JUDGE

DEL MONTE DUNES AT MONTEREY, LTD. AND MONTEREY-DEL MONTE DUNES CORPORATION,	)	NO. C-86-5042 CAL
PLAINTIFFS,	)	
VS.	)	
CITY OF MONTEREY,	)	
DEFENDANT.	)	

SAN FRANCISCO, CALIFORNIA
MONDAY, JANUARY 31, 1994

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:
FREDERIK A. JACOBSEN, ESQ.
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SAN MATEO, CA 94402

FOR DEFENDANT:
GEORGE A. YUHAS, ESQ.
LISA A. WILCOX, ESQ.
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REPORTED BY:
LAWRENCE J. WHITE, CSR, CP, CM
OFFICIAL REPORTER, USDC

COMPUTER-AIDED TRANSCRIPTION BY TURBOCAT

[p. 439] MONDAY, JANUARY 31, 1994 1:45 P.M.

THE COURT: GOOD AFTERNOON.

MR. JACOBSEN: GOOD AFTERNOON.

MR. YUHAS: GOOD AFTERNOON.

THE COURT: WE ARE STILL MISSING ONE JUROR. LET ME GIVE YOU MY READ ON THIS QUESTION OF WHAT HAS TO BE DECIDED BY THE JURY AND WHAT I WILL RESOLVE. STRANGELY INTERESTING QUESTION.

WHAT I SEE ARE A COUPLE OF LINES OF AUTHORITY CONVERGING FROM DIFFERENT STARTING POSITIONS, AND I'M NOT SURE THAT THE BODY OF LAW IS REALLY CONSISTENT. I THINK THE FIRST CUT AT THIS, THOUGH, IS TO TAKE A LOOK AT THE RIGHT TO A JURY TRIAL AS DETERMINED BY THE NATURE OF THE CASE.

NOW, IT SEEMS TO ME THAT IN FEDERAL CONDEMNATION ACTIONS I THINK IT'S QUITE CLEAR THERE IS NO RIGHT TO A JURY, EXCEPT ON THE DAMAGES QUESTION. THESE ARE SO-CALLED SPECIAL PROCEEDINGS.

WHAT THE SUPREME COURT SAID IN U.S. AGAINST REYNOLDS OR REYNOLDS AGAINST THE U.S. AND THE BODY OF PROCEDURE PUT INTO FEDERAL RULE OF CIVIL PROCEDURE 71-A SEEMS TO

COVER IT. I THINK THAT WILL ALSO – AS PRINCIPLES WILL ALSO PROBABLY APPLY TO INVERSE CONDEMNATION CASES BROUGHT AGAINST THE FEDERAL AUTHORITY. BUT WE ARE HERE CONCERNED WITH THE ACTIONS NOT OF FEDERAL AUTHORITY, BUT OF THE STATE AND LOCAL [p. 440] GOVERNMENTAL AGENCIES. ALBEIT, OF COURSE, THIS IS BASED UPON FEDERAL CONSTITUTIONAL PRINCIPLES, STILL THE JURISDICTION IN THIS COURT, I THINK, IS PRIMARILY SECTION 1983. IT ISN'T QUITE PLEADED THAT WAY IN THIS COMPLAINT, BUT IT SEEMS TO ME THAT HAS GOT TO BE THE GENESIS OF THIS COURT'S JURISDICTION.

I THINK THE NINTH CIRCUIT HAS BEEN SAYING, QUITE RECENTLY IN THE ADSULZ (PHONETIC) CASE IN THIS CIRCUIT, THAT WHEN WE ARE TALKING ABOUT THESE LAND CASES BY LOCAL AGENCIES, WE ARE TALKING ABOUT PRIMARILY, BUT NOT EXCLUSIVELY, 1983.

1983 PROVIDES FOR A JURY TRIAL ON ALL ISSUES. THAT'S AN INTERPRETATION OF A PROCEDURAL OR SPECIFIC GRANT OF JURISDICTION BY CONGRESS. SO WE ARE PRINCIPALLY HERE REVIEWING THE ACTIONS OF A STATE AND LOCAL AGENCY UNDER THE UNITED STATES CONSTITUTION, AND I THINK THAT'S INITIALLY A SECTION 1983 TYPE OF APPROACH.

NOW, I THINK FOR THAT REASON THAT A JURY TRIAL AT THIS STAGE IN THE ANALYSIS IS APPROPRIATE. THEN WE GET THE QUESTION WHETHER

EVEN THOUGH A JURY TRIAL IS AT LEAST BY VIRTUE OF THE NATURE OF THE CASE A PROPER METHOD, WHETHER SOME ISSUES SHOULD NEVERTHELESS BE DECIDED BY THE COURT BECAUSE IT'S AN ISSUE OF LAW, OR A MIXED QUESTION OF LAW AND FACT.

NOW, WE HAVE THE BASIC CAUSES OF ACTION HERE, SUBSTANTIVE CAUSES OF ACTION, OR SUBSTANTIVE DUE PROCESS TAKING AND EQUAL PROTECTION. WITH RESPECT TO SUBSTANTIVE DUE PROCESS, WE ALREADY HAVE A PRETTY WELL ESTABLISHED BODY OF LAW [p. 441] ON THE RELATIVE ROLE OF THE JURY VERSUS THE COURT, AND I HAVE ALREADY RULED ON THAT MATTER AND DETERMINED THAT THAT BODY OF LAW REQUIRES ME TO MAKE THE NECESSARY SUBSTANTIVE DUE PROCESS DECISIONS WITHOUT THE JURY.

HOWEVER, ON THE SUBJECTS OF TAKING AND EQUAL PROTECTION, I STILL THINK THAT THESE FALL ON THE JURY'S SIDE OF THE LEDGER. AND THIS IS NOT WITHOUT SOME DOUBTS. BUT I THINK THAT'S WHERE IT PROPERLY BELONGS. SOME OF THE QUESTIONS OVERLAP, SOME OF THEM INVOLVE SOME LEGAL ISSUES, OF COURSE, BUT THE FUNDAMENTAL QUESTION OF A TAKING AND THE FUNDAMENTAL QUESTION OF EQUAL PROTECTION, I THINK THE FACT-INTENSIVE NATURE OF BOTH THOSE DETERMINATIONS IN THIS CASE MEANS THAT IT SHOULD BE A JURY FUNCTION.

SO I'M DETERMINING THE ISSUE OF TAKING AND EQUAL PROTECTION WILL BE SUBMITTED TO

THE JURY. THAT IS, OF COURSE, SUBJECT TO MY POWERS UNDER RULE 50 TO DETERMINE AT THE END OF THE PLAINTIFFS' CASE WHETHER THERE HAS BEEN SUFFICIENT EVIDENCE TO SUBMIT TO THE JURY ON THOSE QUESTIONS.

MR. YUHAS: MAY I HAVE ONE CLARIFICATION?

THE COURT: YES.

MR. YUHAS: IN THE TAKINGS ANALYSIS, THERE ARE, OF COURSE, TWO COMPONENTS. ONE OF THEM DEALS WITH HOW IT IMPACTS THE AVAILABLE USES OR VALUE OF THE PROPERTY, AND THE OTHER ONE IS DOES THE ACTION ADVANCE LEGITIMATE STATE PURPOSE.

I ONLY RAISE THIS BECAUSE THE SECOND PRONG IS [p. 442] SOMEWHAT VERY CLOSE TO THE SUBSTANTIVE DUE PROCESS ANALYSIS. SO I WONDER EVEN IF THE FIRST GOES TO THE JURY, IF THE COURT IS RULING THAT THE SECOND PRONG ALSO GOES TO THE JURY.

THE COURT: YES, AT THE MOMENT, I AM. THE SECOND GOES TO THE JURY, TOO. SEEMS TO ME THAT THE ISSUE IS FAIRLY WELL – FACTUAL ISSUE IS FAIRLY WELL DEFINED HERE.

MR. JACOBSEN: YOUR HONOR, ON THIS SUBJECT, FOR PURPOSES OF SUPPLEMENTING THE RECORD – AND I KNOW YOUR HONOR HAS ANALYZED IT AND WRESTLED WITH THE QUESTION QUITE A BIT – FOR THE RECORD, WHEN YOUR HONOR WAS REFERRING TO THE FEDERAL RULE

71-A AND WHETHER THAT WOULD APPLY TO FEDERAL INVERSE, I THINK THE RECORD SHOULD REFLECT THAT ACTUALLY CONGRESS HAS SPOKEN TO THAT QUESTION.

WE DIDN'T SITE IT IN THE BRIEFS BECAUSE IT WASN'T IMPLICATED, BUT I THOUGHT I WOULD ADVISE YOUR HONOR THAT UNDER FEDERAL PRACTICE IF YOU WANT TO SUE THE FEDERAL GOVERNMENT IN INVERSE CONDEMNATION, CONGRESS HAS STATUTORILY ENACTED THAT AND GIVEN JURISDICTION TO THE CLAIMS COURT. THAT'S WHY YOU WOULDN'T SEE IN DISTRICT COURT INVERSE CLAIMS, BECAUSE CONGRESS HAS PUT THEM THAT WAY.

THE COURT: WHAT DOES THAT LEAVE WITH RULE 71-A? AS TO DIRECT CONDEMNATION, I GUESS.

MR. JACOBSEN: YES. BUT INVERSE FOR 1983. THEY HAVE GIVEN JURISDICTION TO THE DISTRICT COURT FOR INVERSE. THEY PUT IT IN THE COURT OF CLAIMS FOR REASONS THAT ESCAPE ME.

* * *

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES A. LEGGE, JUDGE

DEL MONTE DUNES AT MONTEREY LTD., AND MONTEREY-DEL MONTE DUNE CORPORATION,	)	NO. C 86-5042 CAL
PLAINTIFF,	)	
VS.	)	
CITY OF MONTEREY,	)	
DEFENDANT.	)	

SAN FRANCISCO, CALIFORNIA
FRIDAY, MARCH 4, 1994

FOR PLAINTIFF: LAW OFFICES OF
FREDERIK A. JACOBSEN
520 SOUTH EL CAMINO REAL, SUITE 630
SAN MATEO, CALIFORNIA 94402

BY: FREDERIK A. JACOBSEN, ESQ.

FOR DEFENDANT: ORRICK, HERRINGTON & SUTCLIFFE
OLD FEDERAL RESERVE BANK BUILDING
400 SANSOME STREET
SAN FRANCISCO, CALIFORNIA 94111-3143

BY: GEORGE A. YUHAS, ESQ.
LISA A. WILCOX, ESQ.

REPORTER BY: JAMES J. YEOMANS, CSR
OFFICIAL COURT REPORTER, USDC

COMPUTERIZED TRANSCRIPTION BY XSCRIBE

* * *

[p. 3] NATURE OF THE JURY SYSTEM AND THE JURY PROCE[illegible], SO JUST FOR YOUR INFORMATION.

(PAUSE IN THE PROCEEDINGS)

THE COURT: NOW, DOES EITHER SIDE HAVE ANYTHING FURTHER YOU WOULD LIKE TO ADD WITH RESPECT TO THE DUE PROCESS CLAIM THAT I PREVIOUSLY DETERMINED IS MY RESPONSIBILITY TO DECIDE RATHER THAN THE JURORS?

MR. YUHAS: I WOULD ONLY NOTE, IF THE COURT HAS NOT SEEN IT, THAT YESTERDAY COINCIDENTLY THE 9TH CIRCUIT CAME DOWN WITH A NEW DECISION IN THE AREA OF SUBSTANTIVE DUE PROCESS. WHICH I THINK BASICALLY RESTATES THE BASIC STANDARDS THAT WE ARTICULATED IN SUPPORT OF BOTH THE MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR TRIAL.

THAT CASE IS KAWAOKA, K-A-W-A-O-K-A.

THE COURT: DOES IT SAY ANYTHING DIFFERENT FROM WHAT THE 9TH CIRCUIT SAID IN THIS CASE –

MR. JACOBSEN: I DON'T BELIEVE SO.

THE COURT: – ON PAGE 1508?

MR. YUHAS: NO, I DON'T BELIFVE SO.

MR. JACOBSEN: IF I MIGHT ADD, I DON'T – I'VE JUST HAD A CHANCE TO SKIM THE CASE, IT DIDN'T SPEAK TO THE ISSUE, I DON'T BELIEVE. MAYBE MR. YUHAS' READING HAS BEEN MORE THOROUGH.

I DON'T BELIEVE IT SPOKE TO THE ISSUE OF WHO DECIDES COURT VERSUS JURY. I THINK IT JUST TALKS TO THE STANDARD.

THE COURT: WE'RE BEYOND THAT POINT. RIGHT OR WRONG, [p. 4] ONE OF YOU MAY APPEAL THAT, BUT I WAS TALKING ABOUT WHAT STANDARD I SHOULD BE USING, SINCE I HAVE DECIDED WHAT STANDARD I SHOULD BE USING IN MAKING THAT DECISION.

ANYTHING FURTHER ON THE DUE PROCESS ISSUE?

MR. YUHAS: NOTHING, YOUR HONOR.

MR. JACOBSEN: NO. NOTHING FURTHER.

THE COURT: ALL RIGHT. THIS WILL BE MY FINDINGS OF FACT AND CONCLUSIONS OF LAW, AS WELL AS, I SUPPOSE, A STATEMENT OF REASONS AND OPINION.

IN CONNECTION WITH THE CLAIM FOR SUBSTANTIVE DUE PROCESS, WE HAD THE JURY'S VERDICT WITH RESPECT TO THE TAKINGS CLAIM AND

THE JURY'S VERDICTS WITH RESPECT TO EQUAL PROTECTION.

INITIALLY I WAS, AFTER THE VERDICT CAME IN, AFTER SEEING WHETHER ANY OF THE DECISIONS THERE COMPEL A CONCLUSION ON MY PART ONE WAY OR THE OTHER BASED UPON WHAT THE JURY DID.

I DON'T THINK SO. I THINK THE EQUAL PROTECTION CLAIM IS SORT OF A DIFFERENT CREATURE, THAT DOESN'T GET WRAPPED INTO THE PRESENT SUBSTANTIVE DUE PROCESS ANALYSIS.

AND THE TAKING CLAIM QUESTION IS A LITTLE CLOSER, BUT I THINK THAT BECAUSE OF THE DEFINITION OF TAKING AND THE ALTERNATIVE GROUNDS FOR A JURY – POSSIBLE GROUNDS FOR THE JURY HAVING FOUND FOR THE BEFORE, [sic] THAT I'M REALLY NOT BOUND BY OR IN DANGER OF INCONSISTENCY WITH THE JURY'S DECISION.

LOOKING AT THE INSTRUCTIONS WE GAVE THE JURY ON THE TAKING CLAIM THEY COULD HAVE FOUND A TAKING BASED UPON DENIAL [p. 5] OF ALL ECONOMICALLY VIABLE USE OR THE CITY'S DECISION TO REJECT THE PLAINTIFF'S DEVELOPMENT, NOT SUBSTANTIALLY ADVANCING A LEGITIMATE PUBLIC PURPOSE. SO I AM DOING IT INDEPENDENTLY OF WHAT THE JURY DECIDED AND BASED UPON THE EVIDENCE IN FRONT OF ME.

NOW, THE ISSUE OF SUBSTANTIVE DUE PROCESS IS ONE THAT WAS IDENTIFIED, AND TO A CERTAIN EXTENT, DEFINED BY THE COURT OF APPEALS IN

THE FIRST APPEAL AND THAT DEFINITION IS STANDARD.

OF COURSE, WILL [sic] BE THE LAW OF THE CASE FOR PURPOSES OF MY DECISION HERE.

I BELIEVE THAT THE APPROPRIATE STANDARD IS DEFINED IN PAGE – ON PAGE 1508, 697 FED 2D, THAT IS THE PRIOR APPEAL OF THIS CASE AND DEALS WITH THE QUESTION OF WHETHER THE DECISION BY THE CITY WAS ARBITRARY AND IRRATIONAL OR WHETHER IT WAS A VALID REGULATORY REASON.

AND I THINK SORT OF PARENTHETICALLY THE COURT OF APPEALS SAID IT WAS REALLY TO FORESTALL ANY REASONABLE DEVELOPMENT AND, IN ESSENCE, WAS A COVERUP TO KEEP THE PROPERTY OPEN SPACE.

NOW, I'VE ALREADY DECIDED THAT THIS DUE PROCESS ISSUE IS ONE FOR ME TO DECIDE AS A COURT RATHER THAN AS A JURY, AND MY REASONS FOR DOING THAT HAVE BEEN PUT ON THE RECORD SOME TIME AGO.

NOW, OF COURSE, I'M DEALING WITH THE RESOLUTION OF THE CITY WHICH TURNED DOWN THE, I'LL SAY TURNED DOWN, THE [p. 6] DEVELOPMENT PLAN, THE RESOLUTION OF LOSS.

PRECISELY WHAT THE DATE IS, WHETHER IT WAS JUNE, I BELIEVE THE DECISION WAS ON JUNE 3RD 1986, BUT THE ACTUAL RESOLUTION WAS RECORDED OR ENTERED ON JUNE 17TH OF 1986.

THE LANGUAGE OF THAT RESOLUTION IS QUOTED ON PAGES 1504 AND 1505 OF THE 9TH CIRCUIT'S OPINION. I'M FINDING AND CONCLUDING THAT THE DEFENDANT DID NOT BREACH, DID NOT VIOLATE THE SUBSTANTIVE DUE PROCESS RIGHTS OF THE PLAINTIFFS, PLAINTIFF IN THE DECISION WHICH WAS MADE. I BELIEVE THE FOLLOWING REASONS ARE SIGNIFICANT.

FIRST OF ALL, IT'S OBVIOUS TO ME FROM THE RECORD THAT CONSIDERABLE TIME, I MEAN, EXHAUSTIVE TIME AND ENERGY WAS SPENT BY THE STAFF OF THE CITY AND BY ITS PLANNING COMMISSION IN WORKING ON THIS DEVELOPMENT. AND I THINK IT WAS ALL A SINCERE EFFORT BY THOSE PEOPLE AND I DON'T THINK NOT BEING DONE FOR VALID REGULATORY REASONS OR WAS ATTEMPTING TO FORESTALL ANY DEVELOPMENT.

I THINK IT'S ALSO OBVIOUS FROM THE TESTIMONY I HEARD AND FROM EXHIBITS I READ THAT THE STAFF IN THIS PRE-CONSIDERATION WORK OFTEN ASSISTED THE PLAINTIFFS IN ATTEMPTING TO RESOLVE THEIR PROBLEMS WITH THE COASTAL COMMISSION AND PERHAPS ALSO WITH THE FISH AND GAME AND FISH AND WILDLIFE.

NOW, ONE MIGHT SAY, WELL, IS IT RELEVANT WHAT THE STAFF DID? IS IT ONLY THE RESOLUTION AND MOTIVATION FOR THE RESOLUTION?

[p. 7] WELL, THAT'S AGRUABLE, [sic] BUT I THINK THE QUANTITY OF TIME AND MONEY INVESTED BY THE BOARD'S, IN ESSENCE, THE BOARD'S EMPLOYEES, IS DEMONSTRATIVE OF CONDUCT

WHICH IS NOT ARBITRARY AND IRRATIONAL, BUT WAS FOR VALID PURPOSES.

WE ALSO HAVE THE FACT THAT THE SMITH'S BUTTERFLY (PHONETIC) WAS AND, I GUESS, IS AN ENDANGERED SPECIES, AND THERE WERE DIFFERENCES OF OPINION ON WHAT TO DO ABOUT IT.

FOR EXAMPLE, EXHIBIT 120. I THINK IT WAS STILL AN OPEN QUESTION AS TO WHAT THE COASTAL COMMISSION MIGHT HAVE DONE. THAT IS, AT 1986 I THINK IT WAS STILL AN OPEN QUESTION AS TO WHAT THE COASTAL COMMISSION COULD HAVE DONE.

THE LAST COMMUNICATION, I BELIEVE, FROM THE COASTAL COMMISSION WAS IN 1984, AND I'M REFERRING SPECIFICALLY TO EXHIBITS 48 AND 82.

THERE WERE ALSO NOT FINAL APPROVALS IF THEY WERE NEEDED. I GUESS THEY WERE NOT REALLY NEEDED, BUT THERE WERE NO FINAL BLESSINGS BY THE U.S. FISH AND WILDLIFE. REFERRING TO EXHIBITS 85, 134, 135 AND 145.

AND I THINK THAT IT IS APPARENT THAT THE STATE DEPARTMENT OF FISH AND GAME DID OPPOSE, AND I REFER NOT JUST TO THE TESTIMONY GIVEN IN COURT, BUT ALSO TO THE EXHIBITS, 147 AND, I BELIEVE, 149.

IN ADDITION, OTHER ORGANIZATIONS HAD OPPOSED DEVELOPMENT. EXHIBIT 146 DEMONSTRATES THE SIERRA CLUB'S POSITION FOR VARIOUS REASONS.

[p. 8] SO I THINK THAT THE CITY COUNCIL WAS NOT ACTING ARBITRARY AND IRRATIONALLY IN PASSING A RESOLUTION IN JUNE 1986, IT WAS ACTING FOR VALID REGULATORY REASONS AND NOT ATTEMPTING TO FORESTALL ALL REASONABLE DEVELOPMENT.

SO FOR THAT REASON I'M GOING TO FIND IN FAVOR OF THE DEFENDANT ON THAT ISSUE.

NOW, WHERE ARE WE WITH RESPECT TO THE POST-TRIAL MATTERS, JUDGMENT, POST-TRIAL MOTIONS, ET CETERA?

* * *

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEL MONTE DUNES AT MONTEREY, LTD., et al., Plaintiff-Appellee, -vs- CITY OF MONTEREY, Defendant-Appellant.	)	No. 94-16248 D.C. No. CV-86-05042-CAL
DEL MONTE DUNES AT MONTEREY, LTD., and MONTEREY-DEL MONTE DUNES CORPORATION, Plaintiffs-Appellants, -vs- CITY OF MONTEREY, Defendant-Appellee.	)	No. 94-16313 ORDER (Filed Jun. 26, 1997)

Before: WALLACE and LEAVY, Circuit Judges, and BAIRD,* District Judge.

The petition for rehearing is granted. No further briefing is required. The parties shall be prepared to argue, for no more than 20 minutes per side, the following issue:

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* Honorable Lourdes G. Baird, United States District Judge, Central District of California, sitting by designation.

Whether the jury, rather than the judge, can decide if the City of Monterey's actions substantially advanced a public purpose. (See part IIIB. of our opinion.)

Arguments shall be held in San Francisco on August 6, 1997, at 10:00 a.m. The parties shall direct any further questions to the Clerk of the Court.

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEL MONTE DUNES AT MONTEREY, LTD., et al., *Plaintiff-Appellee,* v. CITY OF MONTEREY, *Defendant-Appellant.*	No. 94-16248 D.C. No. CV-86-05042-CAL
DEL MONTE DUNES AT MONTEREY, LTD., and MONTEREY-DEL MONTE DUNES CORPORATION, *Plaintiffs-Appellees,* v. CITY OF MONTEKEY, *Defendant-Appellee.*	No. 94-16313 ORDER

Filed October 28, 1997

Before: J. Clifford Wallace and Edward Leavy, Circuit Judges, and Lourdes G. Baird,* District Judge.

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* Honorable Lourdes G. Baird United States District Judge, Central District of California, sitting by designation.

ORDER

The panel reheard oral argument in this case on August 6, 1996. The panel has voted not to amend its opinion. The panel has unanimously recommended that the suggestion for rehearing en banc be rejected.

The full court has been advised of the suggestion for rehearing en banc. An active judge called for an en banc vote and a majority of the judges of the court has voted to reject the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The opinion in this case will not be amended, and the suggestion for rehearing en banc is rejected.